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UNITED STATES DISTRICT COURT

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WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA) 21MJ4100

7

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vs.

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Buffalo, New York

RAEKWON GREEN,) July 29, 2021

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Defendant.

1:30 p.m.

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DETENTION HEARING

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Transcribed from an Electronic Recording Device

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TRANSCRIPT OF PROCEEDINGS

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BEFORE THE HONORABLE MARIAN W. PAYSON

UNITED STATES MAGISTRATE JUDGE

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3 P R O C E E D I N G S

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THE CLERK: United States of America versus
Raekwon Green, 21-MJ-4100.

MAGISTRATE JUDGE PAYSON: I received a
pretrial services report. It does recommend Mr. Green's
continued detention.

Mr. Lembke, did you see that report.

Mr. LEMBKE: Yes, I received it and I read
it.

MAGISTRATE JUDGE PAYSON: Mr. Harvey, did
you see the report?

MR. HARVEY: I have, Judge.

MAGISTRATE JUDGE PAYSON: Both parties
prepared to proceed?

Mr. LEMBKE: Yes, your Honor.

MAGISTRATE JUDGE PAYSON: Mr. Harvey, go
ahead.

MR. HARVEY: Your Honor, the government has
moved to detain the defendant on both grounds of risk of
flight and risk of danger to the community. As your

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11:33:58 2 Honor indicated, a pretrial report has been issued and
11:34:05 3 recommends detention on both grounds. The government
11:34:14 4 agrees with those recommendations. As for reasons, I
11:34:18 5 will explain here and in a few moments.

11:34:25 6 All of the 3142 (g) factors in this case
11:34:29 7 strongly favor detention of this defendant pending
11:34:34 8 trial. And I would note, as I did when I first moved to
11:34:40 9 detain the defendant, and that part of our argument will
11:34:44 10 rely on the rebuttable presumption based on the 924(c)
11:34:52 11 charge upon a finding by the Court that there is
11:35:48 12 probable cause to believe that charge has been made out.

11:35:51 13 So, the first factor, your Honor, is the
11:35:55 14 nature and circumstances of the offenses charged. The
11:35:58 15 charged offenses, as your Honor is aware, involve
11:36:02 16 attempted Hobbs Act robbery and possession and
11:36:06 17 brandishing of a firearm during and in relation to a
11:36:09 18 crime of violence. Both of those offenses are
11:36:13 19 exceptionally serious. The severity of those offenses
11:36:18 20 is exemplified by the penalties that both of those
11:36:22 21 offenses carry. The robbery charge itself carries a
11:36:26 22 maximum penalty of 20 years imprisonment, and the
11:36:29 23 firearms charge carries at least seven years of
11:36:35 24 imprisonment up to life consecutive to the robbery
11:36:39 25 charge. Clearly these offenses, just by looking at the

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11:36:43 2 statutes, are exceptionally serious. But, I further
11:36:48 3 state that the circumstances of this particular offense
11:36:51 4 demonstrate how serious these offenses are. And as
11:36:55 5 detailed in the Criminal Complaint affidavit, the
11:36:58 6 charges relate to a violent home invasion robbery that
11:37:01 7 occurred at 331 Conrad Drive on March 22nd, 2020. At
11:37:08 8 the time of the robbery, there were two adult occupants,
11:37:13 9 a female who I'll refer to during this hearing as
11:37:17 10 "Victim 1," and a male who I'll refer to during this
11:37:22 11 hearing as "Victim 2," and two teenage children were
11:37:25 12 present inside the residence. Victims 1 and 2 both
11:37:30 13 describe three black males entering the residence all
11:37:34 14 wearing masks and dark clothing, and two of whom were
11:37:38 15 carrying and brandishing handguns. They indicate that
11:37:43 16 these three black males entered the residence, held them
11:37:46 17 at gun point, searched the house for drugs and money and
11:37:50 18 property and eventually stole personal property and cash
11:37:56 19 before fleeing the residence. Victim 1 states that one
11:38:05 20 of the perpetrators of this offense surprised her from
11:38:09 21 behind in the kitchen of the residence, put his hand
11:38:13 22 over her mouth and told her to be quite. Two of the
11:38:17 23 other perpetrators in the case told her or said at some
11:38:21 24 point, words to the effect, "give me the shit," and "you
11:38:24 25 know what we want," which, she understood to mean that

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11:38:28 2 they were looking for drugs and money. Victim 1
11:38:33 3 admitted that one of her brothers is involved in drug
11:38:37 4 trafficking and was present at the house earlier that
11:38:39 5 day and that is what led her to the conclusion that the
11:38:43 6 perpetrators were looking for drugs and money when they
11:38:46 7 entered the residence. According to Victim 1, the
11:38:50 8 perpetrators eventually took personal property
11:38:53 9 consisting of a cell phone, jewelry and a video gaming
11:38:58 10 system during the robbery. Victim 2, who was also
11:39:02 11 involved in the drug trade, as evidenced by the Criminal
11:39:07 12 Complaint where I note that Victim 2 had been convicted
11:39:10 13 in Federal Court of narcotics conspiracy charges
11:39:13 14 recently, he was playing video games when he was
11:39:18 15 surprised by someone putting a gun in his face. Three
11:39:23 16 of the perpetrators, according to Victim 2, were
11:39:27 17 involved. I'll refer to them as "suspect one," "suspect
11:39:33 18 two" and "suspect three," because Victim 2 was able at
11:39:38 19 least differentiate some of the suspects by some
11:39:42 20 personal characteristics. Victim 2 states that suspects
11:39:45 21 two and three were armed with handguns during the
11:39:48 22 robbery, that one of the perpetrators, referred to as
11:39:56 23 "suspect three," initially held Victim 1, Victim 2 and
11:39:59 24 the two teenage children at gun point in a downstairs
11:40:04 25 bedroom while suspect one remained in the kitchen and

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11:40:08 2 suspect two searched the house for drugs. Victim 2,
11:40:12 3 during the robbery, heard another individual on
11:40:15 4 speakerphone giving directions to suspect two as he
11:40:19 5 searched the house. At one point, suspect two tied
11:40:25 6 Victim 2's hands behind his back and took him through
11:40:28 7 the house to assist in the search for drugs and money.
11:40:35 8 When they went to search and upstairs bedroom, suspect
11:40:38 9 two said, in sum and substance, "if it ain't here, I'm
11:40:43 10 going to do you."

11:40:45 11 MAGISTRATE JUDGE PAYSON: So who was it that
11:40:46 12 tied the hands of Victim 2 did you say?

11:40:49 13 MR. HARVEY: Suspect two.

11:40:51 14 MAGISTRATE JUDGE PAYSON: And led him around
11:40:52 15 the house is what your proffer is?

11:40:54 16 MR. HARVEY: That's right, Judge.

11:40:56 17 Mr. LEMBKE: I'm sorry. I didn't hear what
11:40:58 18 you said. What was your question?

11:41:00 19 MAGISTRATE JUDGE PAYSON: Led him around the
11:41:01 20 house was the question.

11:41:03 21 Mr. LEMBKE: Okay.

11:41:04 22 MAGISTRATE JUDGE PAYSON: Go ahead.

11:41:05 23 MR. HARVEY: Yes. And Victim 2 interpreted
11:41:08 24 suspect two's statements to him to mean that suspect two
11:41:12 25 would shoot Victim 2 if the drugs and money were not

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11:41:18 2 found. Suspect one then came upstairs and told suspect
11:41:26 3 two to shoot victim two if he, meaning Victim 2, did
11:41:32 4 anything wrong. And as they continued the search,
11:41:38 5 Victim 2, who was fearing that he was going to be shot
11:41:42 6 and/or killed, tried to shut suspect one and two in a
11:41:48 7 bedroom and then ran down the hallway and jumped down an
11:41:52 8 entire flight of stairs to try and get away. In that
11:41:57 9 process, victim two broke his leg. But, not withstand
11:42:03 10 having the broken leg and still fearing for his safety,
11:42:07 11 he tried to run out the side door of the residence, but
11:42:11 12 suspects one, two and three caught him and threw him to
11:42:14 13 the floor. Victim 2 stated that he was also pistol
11:42:21 14 whipped during the robbery and had approximately \$2100
11:42:25 15 in cash taken from him, which he has described as the
11:42:28 16 proceeds of the sale of a vehicle that he had recently
11:42:35 17 sold to somebody else. Victim 1 did not identify the
11:42:41 18 defendant in a photo array as we noted in the Criminal
11:42:46 19 Complaint. We submit that is not surprising considering
11:42:49 20 the fact that this defendant as well as the other two
11:42:52 21 perpetrators who entered the house were wearing masks at
11:42:57 22 the time of the robbery. But, your Honor, those facts
11:42:59 23 and circumstances conveyed by victims one and two show
11:43:05 24 that the nature and circumstances of this offense weighs
11:43:09 25 very strongly in favor of detention. The defendant and

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11:43:12 2 his accomplices created a dangerous and life-threatening
11:43:18 3 situation for Victim 1, Victim 2 and the two teenage
11:43:22 4 children. And, frankly, from my perspective, this case
11:43:25 5 is one step away from an assault one shooting or, worse,
11:43:30 6 homicide.

11:43:41 7 With respect to the weight of the evidence,
11:43:44 8 Judge, the evidence in this case is strong. I've laid
11:43:51 9 out a lot of the information relating to this particular
11:43:55 10 robbery in the Criminal Complaint. I shouldn't say I
11:44:00 11 did, but the affiant, Agent Martineck. And I can state
11:44:06 12 that as you can see, there was information from one
11:44:10 13 cooperating witness in the Complaint affidavit who I've
11:44:13 14 referred to as CW 1, cooperating Witness 1. Cooperating
11:44:19 15 Witness 1 is currently in a cooperative posture and is
11:44:24 16 cooperating with the government, obviously, in hopes of
11:44:28 17 obtaining some sort of reduced sentence or disposition.
11:44:31 18 But cooperating Witness 1 provided a detailed account of
11:44:36 19 the robbery of 331 Conrad Drive on March 22nd, 2020. He
11:44:44 20 identified Witness 1 from the affidavit as the
11:44:49 21 individual who arranged the home invasion and drove them
11:44:55 22 to the home invasion. He identified this defendant, who
11:45:00 23 he knew as "Bundles" or "Bundy" as one of the
11:45:06 24 perpetrators who entered the house during the home
11:45:09 25 invasion. And he identified, albeit, at one moment,

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11:45:34 2 Judge, he also identified the third individual who
11:45:40 3 entered the house in a photo array, although I would
11:45:43 4 just like to state exactly what he said about that
11:45:46 5 because it's not quite precise. He was shown a photo
11:45:52 6 array and identified the other perpetrator saying the
11:45:56 7 person in the photograph looked familiar and stated, "I
11:45:59 8 think that is the cowboy," the individual he referred to
11:46:03 9 "Cowboy," "the guy from Greece. I don't know his name,
11:46:07 10 the beard did it for me." The individual he identified
11:46:10 11 in that photo array is another cooperating witness in
11:46:13 12 this case who has confirmed his presence as the
11:46:20 13 perpetrator who entered the house. I'll refer to that
11:46:23 14 cooperating witness as CW 2. CW 2 has entered a plea
11:46:30 15 and cooperation agreement with the government and is
11:46:32 16 currently in a cooperative posture. In proffers with
11:46:37 17 the government, CW 2 has admitted his involvement in the
11:46:41 18 home invasion, identified Witness 1 as the individual
11:46:45 19 who arranged the home invasion and drove the
11:46:47 20 perpetrators to the scene of the home invasion,
11:46:54 21 identified CW 1 as being one of the perpetrators of the
11:47:01 22 home invasion, and, also, eventually identified this
11:47:05 23 defendant as being the fourth perpetrator of the home
11:47:10 24 invasion. And I would like to explain the circumstances
11:47:13 25 of that identification, Judge, just so the record is

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11:47:16 2 clear. In an initial proffer session with CW 2, like I
11:47:25 3 said, he admitted his role in the home invasion at 331
11:47:33 4 Conrad Drive and stated four people involved; three
11:47:37 5 people that entered the house and Witness 1 who entered
11:47:41 6 the house and stayed outside. In the course of that
11:47:45 7 proffer, CW 2 was shown a photo array containing a
11:47:49 8 photograph of this defendant, and CW 2 identified this
11:47:53 9 defendant and said he recognized him or said he "looked
11:47:56 10 like the guy that went to the home invasion with CW 2
11:48:00 11 and Witness 1, from the affidavit, "near a firehouse in
11:48:07 12 Webster." And I say that, Judge, because in other parts
11:48:10 13 of this proffer, CW 2 explained or described a different
11:48:17 14 home invasion robbery that occurred near a firehouse in
11:48:21 15 Webster and he states that Witness 1 from the Complaint
11:48:24 16 Affidavit and this defendant were involved in that home
11:48:27 17 invasion as well. CW 2 stated that he did not know the
11:48:33 18 defendant's nickname, but he said that Witness 1
11:48:37 19 referred to him as "Lil Mans," and CW 2 stated that he
11:48:46 20 was not 100 percent sure, but that it definitely looked
11:48:49 21 like him. And I should note, Judge, that this proffer
11:48:53 22 occurred during the pandemic and it was done via WebEx,
11:48:58 23 so the photo arrays that were shown to the witness were
11:49:01 24 shown over a computer screen.

11:49:06 25 In a subsequent proffer in early February of

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11:49:10 2 this year with CW 2, the investigative team spoke again
11:49:19 3 with that individual. And during that proffer, the
11:49:24 4 investigator showed CW 2 the same photo array in which
11:49:30 5 he previously identified the defendant as being involved
11:49:32 6 in a separate home invasion and asked CW 2 if that
11:49:38 7 person did any other home invasions or what he refers to
11:49:42 8 as "licks" with CW 2. And at first, CW 2 stated that he
11:49:48 9 did not. But then later in the proffer session, he
11:49:55 10 recounted the home invasion at 331 Conrad Drive and did
11:50:03 11 say that there were four perpetrators, including Witness
11:50:09 12 1, CW 1, and he said that the fourth perpetrator was one
11:50:19 13 with a brush cut who was the same guy from the home
11:50:22 14 invasion near the firehouse, referring to the home
11:50:25 15 invasion near the firehouse in Webster. And he did
11:53:47 16 state that the guy from the firehouse, meaning the
11:53:54 17 defendant, had a compact gun during that particular
11:53:59 18 property.

11:54:00 19 MAGISTRATE JUDGE PAYSON: Which particular
11:54:01 20 robbery?

11:54:02 21 Mr. LEMBKE: Which particular robbery?

11:54:03 22 MR. HARVEY: What's that?

11:54:06 23 MAGISTRATE JUDGE PAYSON: Which
11:54:06 24 particular --

11:54:07 25 MR. HARVEY: 331 Conrad. So, Judge, there

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11:54:21 2 are two cooperating witnesses at this point who describe
11:54:24 3 what happened during the home invasion at 331 Conrad as
11:54:28 4 well as two victims that describe what happened. Two
11:54:30 5 witnesses, at this point, identify this defendant as
11:54:33 6 being one of the perpetrators. I would note that the
11:54:39 7 complaint affidavit does layout information from Witness
11:54:43 8 1 who was also involved in the home invasions, the home
11:54:48 9 invasion, excuse me. As we state in the affidavit,
11:54:54 10 Witness 1 had entered a proffer agreement with the
11:54:57 11 government and provided extensive information about this
11:55:00 12 home invasion as well as others. But I want to say for
11:55:05 13 the record, because I didn't reference this in the
11:55:06 14 affidavit, he is not currently in a cooperative posture.
11:55:10 15 But the information that he did provide in those proffer
11:55:14 16 sessions were, obviously, consistent with the
11:55:18 17 information provided by CW 1 and CW 2. Witness 1
11:55:24 18 specifically identified three individuals who
11:55:28 19 participated in the home invasion and each of those
11:55:31 20 individuals are CW 1, CW 2.

11:55:34 21 MAGISTRATE JUDGE PAYSON: So let me ask you
11:55:37 22 a question about CW 1. When you say he is not in a
11:55:40 23 cooperative posture, have you determined that CW 1 has
11:55:45 24 provided you information which was not accurate?

11:55:51 25 MR. HARVEY: No. And, Judge, for the record

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11:55:53 2 W 1.

11:55:54 3 MAGISTRATE JUDGE PAYSON: I'm sorry, W 1.

11:55:56 4 MR. HARVEY: I know.

11:55:57 5 MAGISTRATE JUDGE PAYSON: I was with you.

11:55:59 6 Witness 1.

11:55:59 7 MR. HARVEY: Yes, Witness 1.

11:56:00 8 MAGISTRATE JUDGE PAYSON: You have not made
11:56:01 9 a determination not to engage in further cooperation
11:56:07 10 with Witness 1 because you determined that he was not
11:56:11 11 credible?

11:56:12 12 MR. HARVEY: That's correct, Judge. That's
11:56:15 13 correct, Judge, that is not the case.

11:56:16 14 MAGISTRATE JUDGE PAYSON: It's for some
11:56:17 15 other reason?

11:56:17 16 MR. HARVEY: Yes.

11:56:18 17 MAGISTRATE JUDGE PAYSON: Not having to do
11:56:20 18 with credibility.

11:56:21 19 MR. HARVEY: That's correct, Judge.

11:56:22 20 MAGISTRATE JUDGE PAYSON: Okay.

11:56:26 21 MR. HARVEY: So, Judge, I know it got a
11:56:36 22 little convoluted because of the circumstances, but I
11:56:39 23 submit to you, the weight of the evidence in this case
11:56:42 24 is reasonably strong and there is a substantial chance
11:57:23 25 of the government prevailing at trial were the defendant

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11:57:31 2 to be indicted for the two offenses alleged in the
11:57:35 3 Complaint.

11:57:35 4 With respect to the defendant's personal
11:57:38 5 characteristics, the Pretrial Services Report spells out
11:57:45 6 much of his characteristics, and I would like to focus
11:57:48 7 at least on what I view to be the most aggravating of
11:57:52 8 his personal characteristics and that is his criminal
11:57:54 9 history. The defendant is 24 years old. And since the
11:58:02 10 age of 16, he has sustained seven criminal convictions,
11:58:07 11 that is seven convictions over the course of eight
11:58:10 12 years, four of which are felonies, and three of which
11:58:14 13 were misdemeanors. The Pretrial Services Report gives
11:58:20 14 you the details on all of those, but suffice it to say,
11:58:23 15 over the last eight years, the defendant has served
11:58:26 16 several jail and prison sentences for those offenses and
11:58:33 17 it's apparent from not only this case, but also his
11:58:37 18 criminal record, that he is unable to follow the law, to
11:58:43 19 obey the rules and to live a law abiding life. That
11:58:48 20 point is driven home, not just by the number of
11:58:52 21 convictions and the severity of the convictions, but
11:58:54 22 also by the fact that over the course of his criminal
11:58:58 23 career, he has two probation violations as well as three
11:59:03 24 parole violations. That track record demonstrates that
11:59:07 25 he would be unable to abide by any conditions of release

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11:59:15 2 were this Court to impose them. And, more importantly,
11:59:18 3 that he poses a very significant danger to the community
11:59:22 4 were he to be released from custody. I would rely on
11:59:26 5 the Pretrial Services Report for the details unless your
11:59:30 6 Honor would like to hear more about the criminal record.

11:59:34 7 MAGISTRATE JUDGE PAYSON: Do you have any
11:59:35 8 information with respect to what the nature of the
11:59:38 9 probation violations or parole violations were?

11:59:43 10 MR. HARVEY: You know, your Honor, I was
11:59:44 11 trying to piece that together from the police reports,
11:59:46 12 but I can't give you a definitive answer on that. I
11:59:49 13 have hundreds of pages of police reports relating to
11:59:52 14 this defendant, and I wasn't able to connect them to the
11:59:55 15 dates that are reflected in here. I certainly would be
11:59:59 16 happy to run that down. I would note that, at least
12:00:04 17 with respect to one of the -- the second violation of
12:00:07 18 probation in November of 2013, that violation of
12:00:10 19 probation led to him being resentenced to prison time
12:00:14 20 from his initial probation sentence. So I would submit
12:00:18 21 that is more than likely not just a technical violation
12:00:23 22 where there is a misunderstanding.

12:00:24 23 MAGISTRATE JUDGE PAYSON: Okay. But you
12:00:25 24 don't have any specific information?

12:00:27 25 MR. HARVEY: I don't. I don't.

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12:00:29 2 MAGISTRATE JUDGE PAYSON: Okay.

12:00:38 3 MR. HARVEY: And just to revisit the
12:00:40 4 rebuttable presumption issue, Judge, I think the
12:00:43 5 information provided by victims one and two taken
12:00:46 6 together with the information from CW 1 and CW 2 shows
12:00:50 7 that there is probable cause that this defendant
12:00:54 8 committed a violation of 924(c) by carrying a firearm
12:00:58 9 during and in relation to a crime of violence,
12:01:02 10 possessing it in furtherance of that crime of violence,
12:01:05 11 and brandishing it in furtherance of that crime of
12:01:08 12 violence. So I would ask the Court to apply the
12:01:11 13 presumption in this case. And if you do, the government
12:01:15 14 submits that the defendant, based on the Pretrial
12:01:19 15 Services Report, cannot overcome that rebuttable
12:01:23 16 presumption to show that he would not be a danger to the
12:01:26 17 community or that he would not be a risk of flight. So,
12:01:30 18 based on the proffer, Judge, I would suggest that or I
12:01:33 19 submit that we have shown by a preponderance of evidence
12:01:36 20 that the defendant is a serious risk of flight, and
12:01:40 21 we've shown by clear and convincing evidence that the
12:01:44 22 defendant is a danger to the community if he were to be
12:01:47 23 released from custody.

12:01:48 24 MAGISTRATE JUDGE PAYSON: You talked about
12:01:49 25 in your proffer, you proffered that Victim 2 was, I

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12:01:53 2 think you said, pistol whipped?

12:01:56 3 MR. HARVEY: Yes.

12:01:57 4 MAGISTRATE JUDGE PAYSON: Are you proffering
12:01:58 5 any information as to the identification of the
12:02:01 6 individual or individuals whom you say are responsible
12:02:05 7 for that or perpetrated it?

12:02:10 8 MR. HARVEY: My recollection, and if I could
12:02:12 9 have a moment to confirm this. Victim 2 did not state
12:02:48 10 which of the perpetrators pistol whipped him. Although,
12:02:53 11 I would state, Witness 1, that is W 1, stated that --
12:03:09 12 well, first Witness 1 stated that all three of the
12:03:16 13 perpetrators who entered the residence carried guns,
12:03:20 14 including this defendant who carried a black 380. And
12:03:24 15 Witness 1 states that a male inside the residence ran
12:03:29 16 and broke his leg after Bundy, who was this defendant,
12:03:35 17 pistol whipped him. So Witness 1 states that this
12:03:38 18 defendant was responsible for pistol whipping victim
12:03:42 19 two.

12:04:16 20 MAGISTRATE JUDGE PAYSON: Okay. Anything
12:04:21 21 else, Mr. Harvey?

12:04:24 22 MR. HARVEY: No, your Honor.

12:04:25 23 MAGISTRATE JUDGE PAYSON: Okay. Mr. Lembke.

12:04:27 24 Mr. LEMBKE: Your Honor, give me just one
12:04:29 25 moment, please.

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12:08:02 2 MR. HARVEY: Actually, Mr. Lembke, I'm sorry
12:08:04 3 it's not apparent from the Pretrial Services Report, the
12:08:07 4 defendant's first two felony convictions were for
12:08:47 5 attempted burglary in the second degree. Both of those
12:08:53 6 involved dwellings and did involve completed burglaries
12:09:00 7 of residences. The first at 603 Pullman Avenue in June
12:09:05 8 of 2012, and the second one is at 26 Pearl Street in
12:10:07 9 October of 2012, during which the defendant and others
12:10:13 10 that he was involved with entered the house and stole
12:10:17 11 personal property.

12:10:20 12 MAGISTRATE JUDGE PAYSON: Okay. Thank you.

12:10:21 13 MR. HARVEY: You're welcome.

12:10:44 14 Mr. LEMBKE: I would like to focus your
12:10:46 15 Honor on really what the principle issue is here and
12:10:52 16 that is whether Raekwon Green was, in fact, one of the
12:10:59 17 three perpetrators of this robbery at 331 Conrad Street
12:11:08 18 on March 22, 2020. There is, in my view, some
12:11:18 19 significant inconsistency in the versions and
12:11:25 20 descriptions of the incidents of that evening. I
12:11:29 21 believe it was that night around 8 or 8:30 at night when
12:11:34 22 this allegedly happened. And, in that regard, I want to
12:11:41 23 call to the Court's attention that we have, essentially,
12:11:44 24 we have three witnesses -- not essentially, we do. We
12:11:48 25 have three sources of information, we'll call it.

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12:11:51 2 Whether they are witnesses or not, I suppose, is a
12:11:56 3 characterization. These are three sources of
12:11:58 4 information, not including the two victims because
12:12:04 5 they've identified what happened in there, but they
12:12:08 6 weren't able to identify the individuals, obviously.
12:12:11 7 Witness 1, based upon my reading of the Criminal
12:12:20 8 Complaint, is a drug user. And the reason I say that is
12:15:14 9 because in the Criminal Complaint under Witness 1's
12:15:21 10 information, the witness admitted to his role in two
12:15:28 11 home invasion robberies, one on Avenue E and one on
12:15:34 12 Wellington Street, and identified co-conspirators who
12:15:36 13 participated in those crimes. And he describes, as I
12:15:44 14 recall it correctly, that the witness told the
12:15:52 15 government that he had to be careful because they were
12:15:56 16 trying to hit a drug dealer's sister's house and that he
12:16:03 17 had to be careful because he was buying heroin from his
12:16:07 18 drug dealer, from this drug dealer. So, and he had a
12:16:14 19 hunch that drugs would be in the house because this drug
12:16:17 20 dealer received heroin about once a month. So, Witness
12:16:28 21 1 is, seems to me, and I guess the government can
12:16:33 22 confirm this, if they have this information, is a heroin
12:16:37 23 user, a drug addict. Witness 1 is also problematic
12:16:46 24 because as I listened to the government's proffer,
12:16:51 25 seemed to me that the description that Witness 1 was

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12:16:54 2 giving of the other three perpetrators of this crime was
12:16:58 3 pretty vague. For example, one -- and we would think,
12:17:03 4 by the way, and as I understand it, this witness was
12:17:07 5 involved in a number of these burglaries and robberies,
12:17:15 6 would be familiar with, had an opportunity to observe
12:17:19 7 the individuals with whom he was allegedly engaged in
12:17:23 8 this serious criminal conduct. He identified, as I
12:17:26 9 understand the government's proffer, my client, and as
12:17:33 10 someone he knew as "Bundy." So, we're talking about a
12:17:37 11 situation where he doesn't know the person's name,
12:17:44 12 didn't really give a detailed description of my client,
12:17:53 13 and, as I understand it, had participated in at least
12:17:57 14 one, this one, and maybe more of these incidences. And
12:18:03 15 when it comes to the second person, he fingers, or a
12:18:06 16 second person that he fingers as being part of this
12:18:13 17 March 22 second robbery, he is given a photo array and
12:18:20 18 says "I think that is Cowboy. The beard did it for me."
12:18:27 19 These are not particularly significant identifications
12:18:29 20 and I'm not given really with any type of certainty, in
12:18:33 21 my view, the Court can rely on. Another interesting
12:18:39 22 thing about Witness 1 is when it comes to this pistol
12:18:45 23 whipping incident, as I read the Criminal Complaint and
12:18:52 24 as I understand the government's proffer, what Witness 1
12:18:57 25 said about pistol whipping is that, first of all, I

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12:19:13 2 should say that Victim 2, the person who is allegedly
12:19:19 3 pistol whipped, recounts that suspects one, two, and
12:19:33 4 three caught victim two, threw him to the floor, which I
12:19:44 5 infer to mean the floor of the home, inside, and that
12:19:54 6 victim one was pistol whipped during the robbery. What
12:20:03 7 Witness 1 says is that while inside the location, the
12:20:20 8 male occupant of the house ran and broke his leg after
12:20:25 9 Bundy pistol whipped him. Witness 1 was not inside the
12:20:32 10 location. There is no possible way for Witness 1, as we
12:20:36 11 understand it, and based upon the government's proffer,
12:20:38 12 my understanding from reading the Complaint was that
12:20:44 13 Witness 1 was the driver and waited outside while the
12:20:47 14 three perpetrators went inside. So what we have here is
12:20:51 15 we have a plain statement by Witness 1, clearly making
12:20:55 16 up information or providing information that he obtained
12:21:00 17 from some other person, which is hearsay, it really
12:21:05 18 shouldn't even be in this affidavit.

12:21:13 19 MAGISTRATE JUDGE PAYSON: Okay.

12:21:14 20 Mr. LEMBKE: So Witness 1 is problematic.
12:21:20 21 Witness two, no, cooperating Witness 1, as I understand
12:21:29 22 it, also, identified the two other individuals that went
12:21:57 23 into the house, one of which he knew, again, as Bundy or
12:22:01 24 Bundles. They enter through the back door while W 1
12:22:08 25 waited outside in the car. There is a statement here by

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12:22:13 2 the confidential Witness 1 that all three men were armed
12:22:18 3 with handguns. There is a statement in the Criminal
12:22:25 4 Complaint from, I believe, Witness 1 that states that
12:22:28 5 two of the three, yeah, suspects, Victim 2 stated, and
12:22:33 6 going down, and I'm at paragraph six, "suspects two and
12:22:40 7 three were armed with handguns." CW 1 was also the one
12:22:48 8 that had difficulty identifying the third individual who
12:22:54 9 entered as that of Cowboy and that the beard did it for
12:22:59 10 him. Confidential witness two --

12:23:01 11 MAGISTRATE JUDGE PAYSON: I'm a little
12:23:03 12 confused, because I think you said that about Witness 1,
12:23:07 13 so is it Witness 1 or CW 2? Let me ask Mr. Harvey to
12:23:12 14 clarify.

12:23:13 15 MR. HARVEY: It's CW 1.

12:23:15 16 MAGISTRATE JUDGE PAYSON: CW 1 is the one
12:23:16 17 that looks at the array and says, "I think that is
12:23:20 18 Cowboy. And the beard did it for me"?

12:23:23 19 MR. HARVEY: Yes.

12:23:23 20 Mr. LEMBKE: Right. I'm sorry. I'm sorry.

12:31:11 21 MAGISTRATE JUDGE PAYSON: No problem.

12:31:24 22 Mr. LEMBKE: Yeah. Witness 1 says that the
12:31:26 23 three individuals participating in the home invasion
12:31:29 24 were Zay, Bundy and Jeff. And as I understand the
12:31:36 25 proffer, there was only a photo array shown to Witness 1

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12:31:41 2 that was discussed here where he identified my client as
12:31:46 3 being Bundy. I don't know whether you said -- I can't
12:31:51 4 remember if he said he identified the other two from
12:31:54 5 photo arrays or not.

12:31:57 6 MR. HARVEY: I'll clarify. I didn't say
12:32:01 7 that, but I'm about to.

12:32:03 8 Mr. LEMBKE: Okay. Go ahead.

12:32:04 9 MR. HARVEY: In regard to Witness 1, in
12:32:06 10 reviewing the reports, he identified each of the three
12:32:09 11 perpetrators in photo arrays. And he did use the words
12:32:14 12 that are set forth in the Complaint Affidavit. We
12:32:16 13 included only the photo array referenced for this
12:32:20 14 defendant because he is the one charged in this
12:32:23 15 Complaint, but there were photo arrays done for the
12:32:25 16 other two perpetrators as well.

12:32:27 17 MAGISTRATE JUDGE PAYSON: Okay. Thank you.

12:32:28 18 MR. HARVEY: And his statement of their
12:32:30 19 names, at least with respect to Zay and Jeff is
12:32:33 20 shorthand versions of their actual first names.

12:32:38 21 Mr. LEMBKE: So, moving onto Confidential
12:32:42 22 Witness 2 is the most problematic. Because, first of
12:32:49 23 all, Confidential Witness 2 was shown a photo array. I
12:32:53 24 understand it was over video, but, nonetheless, as Mr.
12:33:01 25 Harvey said, this was during the pandemic. So it's hard

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12:33:03 2 to nail that down in terms of time, but clearly closer
12:33:07 3 to the incident than February of 2021. My guess is that
12:33:12 4 it was probably sometime in middle or, you know, of 2020
12:33:19 5 because that was kind of the height of COVID, but, in
12:33:23 6 any event, the first time around, he didn't identify Mr.
12:33:31 7 Green as being one of the participants in the Conrad
12:33:37 8 Drive incident. In fact, even when it -- when he was
12:33:46 9 trying to identify, I believe it was a photo array of
12:33:52 10 the defendant, Mr. Green, said "it looked like someone
12:33:56 11 that participated in a home invasion robbery near a
12:34:01 12 firehouse in Webster." And I think by that he was
12:34:05 13 referring to Mr. Green and that's a photo of Mr. Green.
12:34:12 14 He didn't identify him as being a participant of Conrad
12:34:18 15 Drive. And then sometime later, we don't know because
12:34:23 16 we don't know when the first attempt at the photo array,
12:34:26 17 he was shown the same photo array as the firehouse in
12:34:31 18 Webster, and, as I understand it, CW 2 said he did not,
12:34:39 19 I didn't really catch what that was, did not see
12:34:45 20 somebody in there. He recounted what happened at 331
12:34:51 21 Conrad and the four perpetrators and he described the
12:34:56 22 fourth, who I understand to be allegedly my client as
12:35:01 23 someone with a brush cut, the same guy as at the
12:35:06 24 invasion at the home invasion at the firehouse. So, CW
12:35:12 25 2, and it's difficult, it's really kind of difficult for

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12:35:15 2 me to follow, you know, when we're using these "CW 2,"
12:35:21 3 "CW 1" type of nomenclature, but this clearly CW 2's
12:35:28 4 identification is problematic. And let's just step back
12:35:35 5 a second. This is not a situation where we're talking
12:35:37 6 about witnesses who are unknown to the perpetrators who
12:35:41 7 are victims of crime, who sees people for split seconds
12:35:46 8 and we're going back now and nitpicking the
12:35:49 9 identification of whom did what to whom, which took
12:35:52 10 place in a split second. We're talking about partners
12:35:55 11 in crime here, people who drove to the place together,
12:35:58 12 who left the place together, who we could assume had
12:36:01 13 some sort of relationship, who, as I understand the
12:36:04 14 proffer as a whole, did have some sort of relationship
12:36:08 15 in committing other offenses similar to this offense,
12:36:12 16 and you would think there would be a little bit more
12:36:15 17 consistency and a little bit more certainty as to the
12:36:18 18 other individuals with whom they were entering a house
12:36:22 19 to steal money and drugs and beat people up. So just as
12:36:28 20 a whole, in general, all of this information is
12:36:30 21 problematic, in my view, to the Court in determining
12:36:33 22 whether it's reliable enough to establish probable
12:36:37 23 cause. And I just want to step back on another point
12:36:43 24 and say that what I find to be somewhat interesting, if
12:36:49 25 not remarkable and certainly noteworthy and important

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12:36:54 2 for the Court to consider concerning the government's
12:36:57 3 proffer, it's really a kind of lack of detailed
12:37:00 4 information among the three sources of information, even
12:37:07 5 the five sources of information, the two victims being
12:37:10 6 two of them and then three of the four participants, if
12:37:14 7 you will, the driver and the other two men. It seems to
12:37:21 8 me, Judge, that what has been recounted here is so vague
12:37:33 9 it lacks in substantial detail such that it's kind of
12:37:38 10 information that people can pick up from here or there
12:37:44 11 or piece together or just talk in kind of generalities
12:37:48 12 as opposed to specificity, and there is really not much
12:37:52 13 in terms of specific conduct of any of the individuals
12:37:55 14 that can give the Court, you know, the kind of comfort
12:38:02 15 level in saying, yeah, those are pretty detailed
12:38:06 16 recitations of fact of what happened. Really, what we
12:38:09 17 get here, a bunch of guys went in. The woman was, you
12:38:14 18 know, was grabbed and put a hand over her mouth, they
12:38:21 19 tied the guy up, walked him around, they said bad things
12:38:24 20 to him, the guy tried to run away, and he broke his leg,
12:38:55 21 and somebody hit him and they got the hell out of there,
12:38:58 22 heck out of there, sorry about that. So, in that
12:39:03 23 regard, I think that the government's proffer relates to
12:39:07 24 the weight of the evidence, which I think is the
12:39:10 25 significant thing here because, look, let's face it, I

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12:39:14 2 read the presentence report, and I read all of the
12:39:16 3 violations of probation and all of those violations of
12:39:20 4 parole, and all of those prior convictions. And Mr.
12:39:23 5 Green and I have talked about it, in terms of that, you
12:39:28 6 know, there is not a lot to recommend release here for
12:39:32 7 him. But the problem is, you can't hold a guy in
12:39:35 8 custody if you don't have proof that he done it. And I
12:39:39 9 don't think you have proof that he done it. And that is
12:39:42 10 my proffer.

12:39:44 11 MAGISTRATE JUDGE PAYSON: Okay. Mr. Harvey,
12:39:47 12 is there anything you want to say in response?

12:39:49 13 MR. HARVEY: Judge, I guess I'll clarify a
12:39:56 14 few things. I think you can rely on the information
12:40:02 15 from Witness 1. I don't think that, based on my review
12:40:05 16 of the reports relating to his proffers, that he is a
12:40:09 17 drug user. I believe he was getting description
12:40:14 18 quantities from the 331 Conrad Street robbery, so there
12:40:20 19 was no particular indication that that witness was a
12:40:23 20 drug user.

12:40:24 21 MAGISTRATE JUDGE PAYSON: As opposed to a
12:40:25 22 drug dealer.

12:40:26 23 MR. HARVEY: Right, right, that is my
12:40:27 24 understanding, Judge. With respect to how he found out
12:40:32 25 this defendant was the one that pistol whipped Victim 2,

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12:40:37 2 the report does not specifically say where his source of
12:40:41 3 information was for that, but presumably it was in
12:40:44 4 conversation among co-conspirators because there were
12:40:47 5 three people in the house who returned to the car with
12:40:50 6 Witness 1 and fled the area. So, presumably, that was a
12:40:55 7 subject of conversation. And, I say, I think the Court
12:40:58 8 can infer that because, how else would Witness 1 know
12:41:02 9 what happened inside that house? There was no other
12:41:05 10 connection between Victim 1.

12:41:07 11 MAGISTRATE JUDGE PAYSON: Well, I can think
12:41:09 12 of at least one other man or I think Mr. Lembke raises a
12:41:15 13 valid point here, which is that Witness 1, by the
12:41:24 14 government's own proffer, didn't go into the house
12:41:27 15 during the robbery. Somebody, according to the
12:41:31 16 government's proffer, is giving directions over a
12:41:33 17 telephone, and, I presume, that that person also may be
12:41:38 18 hearing what's going on, and, you know, I think that
12:41:45 19 there are probably different scenarios under which
12:41:49 20 Witness 1 may have come into that information. Perhaps
12:41:53 21 one scenario is more reliable than another, and I think
12:41:57 22 it is a valid question because -- and you didn't proffer
12:42:02 23 that. I asked you that question, if I'm remembering
12:42:05 24 that correctly, I don't think you said in your proffer
12:42:09 25 that the defendant pistol whipped. You said there was a

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12:42:12 2 pistol whipping. And I asked you a question, so I take
12:42:16 3 from that, you were making your proffer without relying
12:42:19 4 on that fact, but I think Mr. Lembke raises a reasonable
12:42:23 5 point as to the reliability of Witness 1's assertion in
12:42:29 6 that respect since we don't have any other information
12:42:33 7 or I don't know, in the Complaint, as to who committed
12:42:37 8 the alleged pistol whipping. And I guess what I think
12:42:48 9 you're also telling me is that Witness 1, who is no
12:42:52 10 longer in a cooperative posture. So you're probably
12:42:56 11 stuck with whatever reports you have in terms of whether
12:42:59 12 you can go back and figure out where you have any
12:43:02 13 information as to where that -- what that was based on,
12:43:06 14 right? You can't go back to Witness 1 because Witness 1
12:43:09 15 is no longer in a cooperating posture.

12:43:12 16 MR. HARVEY: Right. I can go back to the
12:43:14 17 investigators and see if they asked him that question.

12:43:16 18 MAGISTRATE JUDGE PAYSON: Right, right.
12:43:17 19 That is what I'm saying. You may be able to get the
12:43:20 20 information from investigators, but if they don't have
12:43:23 21 it and it's not noted, you can't get that from Witness 1
12:43:26 22 right now.

12:43:26 23 MR. HARVEY: I think that is fair to say,
12:43:28 24 Judge. Although I don't know what other source of
12:43:30 25 information Witness 1 would have had because the victims

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12:43:35 2 of the home invasion did not report it to the police for
12:43:38 3 obvious reasons, and my understanding is that Victim 1
12:43:42 4 and Victim 2 have no relationship with Witness 1.

12:43:46 5 MAGISTRATE JUDGE PAYSON: Well, isn't it
12:43:47 6 possible that, and we can divorce it from this
12:43:52 7 particular case, but, I mean, we've all seen cases where
12:43:55 8 somebody purports to have information and when you track
12:43:58 9 down what the source of that is is somebody heard it
12:44:01 10 from somebody who heard it from somebody who passes
12:44:05 11 along to somebody else. So Witness 1 may have been in a
12:44:09 12 position to have learned that from the perpetrators, and
12:44:15 13 you're assuming that he did, but it seems to me it's
12:44:20 14 possible that he didn't learn it directly from the
12:44:23 15 perpetrators. And I just think we don't have any
12:44:26 16 information, you know, as to where that came from. Your
12:44:30 17 theory is certainly plausible, but I think there are
12:44:35 18 other plausible inferences.

12:44:38 19 MR. HARVEY: I understand, Judge. It's
12:44:40 20 certainly possible it came from another avenue. I mean,
12:44:44 21 I can try and find out the answer to that question,
12:44:46 22 first of all. Second of all, even if he did get it from
12:44:50 23 another source, whether or not this defendant or one of
12:44:53 24 the other armed accomplices who entered the house with
12:44:56 25 him pistol whipped Victim 2, I don't think is the most

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12:45:06 2 significant fact here. The fact is --

12:45:08 3 MAGISTRATE JUDGE PAYSON: That's fine. I
12:45:10 4 asked the question, you didn't proffer it, so I can see
12:45:15 5 why Mr. Lembke would think it's important to raise that
12:45:18 6 issue because it's something that I thought might be
12:45:20 7 important. I understand you're saying that you're not,
12:45:23 8 you're not relying on that.

12:45:25 9 Mr. Moynihan, we're probably going to be a
12:45:27 10 few more minutes.

12:45:29 11 So, I think what you're telling me is that
12:45:32 12 you would be moving for detention and indeed you made
12:45:36 13 your proffer without inclusion of that allegation.

12:45:40 14 MR. HARVEY: I think my proffer continued in
12:45:42 15 responses to the Court's questions.

12:45:43 16 MAGISTRATE JUDGE PAYSON: No, you're saying
12:45:44 17 there is a basis to detain the defendant irrespective of
12:45:49 18 the pistol whipping.

12:45:50 19 MR. HARVEY: Right.

12:45:51 20 MAGISTRATE JUDGE PAYSON: I understand.

12:45:52 21 MR. HARVEY: But I'm also saying that I'm
12:45:54 22 happy to try and track that down and get that answer to
12:45:56 23 the court if that were material to the Court's decision.

12:45:59 24 MAGISTRATE JUDGE PAYSON: Okay. Was there
12:46:00 25 something else?

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12:46:01 2 MR. HARVEY: I mean, your Honor, I would
12:46:04 3 state that, you know, each of Cooperating Witness 1 and
12:46:09 4 Cooperating Witness 2, both gave detailed statements
12:46:13 5 about this robbery. And the bottom line is, and I could
12:46:20 6 go into more detail about what they stated chapter and
12:46:24 7 verse, but Victim 1 and Victim 2's facts of what
12:46:28 8 happened inside that house and Cooperating Witnesses 1
12:46:33 9 and 2 give us the identity of the people that did it, so
12:46:37 10 that is my point.

12:46:38 11 MAGISTRATE JUDGE PAYSON: Okay. What I
12:46:40 12 would like is information, and I think it probably would
12:46:45 13 come from the government rather than pretrial services
12:46:48 14 with respect to the parole violations. I would like to
12:46:53 15 know what is the basis of those violations when we're
12:46:56 16 talking about parole violations. You know, Monroe
12:47:00 17 County probation violations, I know that is information
12:47:02 18 that pretrial can often provide to me. I'm not sure
12:47:05 19 that is true about parole. So I don't know who has
12:47:09 20 easier access to that information, Mr. Harvey.

12:47:12 21 PROBATION: Your Honor, we can request
12:47:15 22 parole records. Sometimes we don't get them in a timely
12:47:19 23 fashion.

12:47:19 24 MAGISTRATE JUDGE PAYSON: That is what I
12:47:20 25 thought. Why don't I ask Mr. Harvey to see if he can

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12:47:23 2 track that down.

12:47:24 3 MR. HARVEY: Happy to do it, Judge.

12:47:26 4 MAGISTRATE JUDGE PAYSON: I know there are
12:47:27 5 two pro-operation violations that the government noted
12:47:31 6 and Mr. Lembke acknowledged them, they are in 2013. I'm
12:47:35 7 not saying that that is irrelevant for my purposes
12:47:39 8 because, you know, as the government indicated, and I
12:47:46 9 think Mr. Lembke will acknowledge, looking at the
12:53:49 10 criminal history is not, you know, it's not a
12:53:52 11 particularly compelling showing, by the defense, for
12:53:57 12 release. But, as to the violations of probation, Mr.
12:54:03 13 Green was, you know, relatively young. I'm not -- I
12:54:07 14 don't think we need to go back and find out what the
12:54:10 15 basis of the violations of probation were in 2013, but I
12:54:15 16 am interested in the violations of parole on the
12:54:19 17 subsequent, subsequent convictions. And I would agree,
12:54:25 18 Mr. Lembke. So, you're certainly welcome, you know, if
12:54:29 19 you have any information about any of those violations
12:54:31 20 that you think would be helpful for me to consider, you
12:54:36 21 are welcome to send me an e-mail with a copy to the
12:54:40 22 government and give me any information that you would
12:54:43 23 like to proffer. You're certainly right that that is
12:54:48 24 information the Court considers, and considers fairly
12:54:52 25 significantly, as you know. I don't disagree with you

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12:54:56 2 that, you know, before I get to criminal history, I do
12:54:59 3 have to look at the crime that is being charged here. I
12:55:05 4 am, you know, I'm keenly aware of the requirement that
12:55:09 5 there be probable cause. You know, I'm the Judge who
12:55:13 6 signed the Complaint. I reviewed it carefully, noting
12:55:18 7 some of the observations, frankly, that the defense
12:55:21 8 made. But on balance, determining on the basis of what
12:55:25 9 had been presented to me in the Complaint that a showing
12:55:27 10 of probable cause had been made. But, I don't, you
12:55:32 11 know, I don't disagree with you that I don't get to
12:55:35 12 criminal history, you know, unless I'm satisfied that
12:55:38 13 certainly this is, you know, a crime for which probable
12:55:44 14 cause has been -- has been shown. That was my, my
12:55:49 15 conclusion at the time the Complaint was presented to
12:55:53 16 me, but I certainly would like to think about that issue
12:55:56 17 again in light of the arguments that you've made. But,
12:56:04 18 you know, assuming that I reach that conclusion, the
12:56:07 19 criminal history is significant, so I think if there is
12:56:11 20 anything that you do want to offer on any of -- on any
12:56:15 21 of that, you're certainly welcome to do that.

12:56:19 22 MR. LEMBKE: I understand. Thank you.

12:56:20 23 MAGISTRATE JUDGE PAYSON: Okay. I think
12:56:23 24 that is it. I don't have any particular -- I would say,
12:56:26 25 Mr. Harvey, if you do have an answer to what the basis

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12:56:31 2 is for Witness 1's allegation, I would welcome your
12:56:38 3 telling me that. If Mr. Lembke wants to respond in any
12:56:43 4 fashion, of course, he may. He is not required to do
12:56:46 5 that. Okay. So I'm going to reserve on this motion and
12:56:56 6 await further information from the government. And, Mr.
12:57:00 7 Lembke, you know, at some point after you receive
12:57:03 8 information from Mr. Harvey, if you would be kind enough
12:57:06 9 just to let me know do you want to respond or not.

12:57:10 10 Mr. LEMBKE: I will.

12:57:11 11 MAGISTRATE JUDGE PAYSON: What would you
12:57:12 12 like to do about a preliminary hearing or a further
12:57:14 13 status conference?

12:57:16 14 Mr. LEMBKE: We would like to schedule a
12:57:18 15 preliminary hearing.

12:57:20 16 MAGISTRATE JUDGE PAYSON: Okay. My
12:57:33 17 recollection is that we were in here on Monday was the
12:57:37 18 day he was arrested and appeared, which was the 26th, is
12:57:41 19 that right?

12:57:43 20 MR. LEMBKE: July? Yes.

12:57:50 21 MAGISTRATE JUDGE PAYSON: Yes. And you said
12:57:51 22 you wanted to address the preliminary hearing today. So
12:57:54 23 I think we count from today, not Monday.

12:57:56 24 Mr. LEMBKE: Well, okay.

12:57:58 25 MAGISTRATE JUDGE PAYSON: Fourteen days,

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12:57:59 2 and, I mean, generally, I ask, do you want to address
12:58:02 3 the issue of a preliminary hearing today or on Thursday.

12:58:06 4 Mr. LEMBKE: All right. I mean, we're
12:58:08 5 talking about, you know, three days, but, still, I think
12:58:11 6 the statute says that it's not later than 14 days after
12:58:15 7 initial appearance. So I don't know.

12:58:18 8 MAGISTRATE JUDGE PAYSON: It is, unless, and
12:58:19 9 I say, do you want to schedule a preliminary hearing at
12:58:23 10 the initial appearance, and if the issue is I would like
12:58:25 11 to address that on Thursday, then, I've always
12:58:30 12 understood, and I think others have understood that that
12:58:33 13 means you're not going to come in on the 13th day and
12:58:36 14 say, okay, now I want to have it tomorrow.

12:58:39 15 Mr. LEMBKE: I guess I understand.

12:58:42 16 MAGISTRATE JUDGE PAYSON: But, you know, if
12:58:43 17 it doesn't matter to Mr. Harvey, I don't, you know, I'll
12:58:47 18 put it on for the 9th. Judge Pedersen will handle it,
12:58:51 19 in any event, because I won't be here. So, do you want
12:58:54 20 it on the 9th? Can you present next week if that is
12:58:59 21 what --

12:58:59 22 MR. HARVEY: I'll be presenting next week,
12:59:00 23 but I would like the full 14 days, please.

12:59:03 24 MAGISTRATE JUDGE PAYSON: Well, I suggest
12:59:05 25 that you go back and listen to the recordings and I

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12:59:10 2 think that, unless Mr. Lembke is telling me that he is
12:59:15 3 satisfied with the 12, I don't want to have any argument
12:59:19 4 that it should have been on the 9th rather than the
12:59:24 5 12th. My understanding was that the issue of the
12:59:27 6 preliminary hearing was going to be addressed today and
12:59:29 7 the period of time from Monday to Thursday would not
12:59:32 8 count. But --

12:59:34 9 MR. HARVEY: That was my understanding, too.

12:59:35 10 MAGISTRATE JUDGE PAYSON: But, as you know,
12:59:36 11 I've had so many appearances in the last two weeks. I
12:59:40 12 don't recall the record.

12:59:40 13 MR. HARVEY: This would be a first in my
12:59:42 14 experience if counsel were to retroactively start
12:59:48 15 clocking that. I'll double check the recording, but
12:59:50 16 that is my understanding.

12:59:51 17 MAGISTRATE JUDGE PAYSON: With that
12:59:52 18 understanding, I'll put it on for August 12th. And I'm
12:59:58 19 going to put it on at 2 p.m. on August 12th. I will
13:00:03 20 send an e-mail to Judge Pedersen and confirm his
13:00:06 21 availability for a preliminary hearing.

13:00:09 22 I assume, Mr. Harvey, that you're going to
13:00:11 23 present the case to the grand jury?

13:00:12 24 MR. HARVEY: Yes, that's right, Judge.

13:00:14 25 Mr. LEMBKE: Your Honor, I have an another

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13:00:16 2 appearance in court on at 2:30 on the 12th, city court.

13:00:26 3 I can adjourn that.

13:00:29 4 MAGISTRATE JUDGE PAYSON: What? He is not
13:00:37 5 in that day?

13:00:39 6 THE CLERK: It looks as though he is out.

13:00:41 7 MAGISTRATE JUDGE PAYSON: Sorry, Mr. Harvey.

13:00:42 8 I'm going to go to the 11th since Judge Pedersen is
13:00:46 9 evidently not here on the 12th. 2 o'clock on the 11th.

13:00:53 10 Okay? I'm reserving on the government's motion for
13:00:55 11 detention. We'll put this on for a preliminary hearing
13:00:59 12 on August 11th at 2 o'clock. Anything else?

13:01:06 13 MR. HARVEY: No, your Honor.

13:01:07 14 Mr. LEMBKE: Judge, I do. Well, I did want
13:01:09 15 to address one thing. I don't think, however, that as I
13:01:12 16 understand it, the running of this detention hearing and
13:01:17 17 the running of the preliminary hearing do not affect the
13:01:21 18 timing of when the government would have to bring an
13:01:26 19 indictment, which I think is 30 days from the day of the
13:01:29 20 defendant's, of his arrest. Do you have a different
13:01:34 21 position on that?

13:01:37 22 MR. HARVEY: The way we handle it is it's 14
13:01:40 23 days for somebody in custody and, yes, it would be from
13:01:43 24 the day of arrest, if you were to request the PH on that
13:01:47 25 day.

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13:01:48 2 MAGISTRATE JUDGE PAYSON: No, I'm talking
13:01:49 3 about the indictment, the 30 days you have to indict him
13:01:52 4 under 3161(b).

13:01:55 5 MR. HARVEY: It's 14 days. I would love to
13:01:58 6 have 30 days.

13:01:59 7 MAGISTRATE JUDGE PAYSON: No, Mr. Harvey, I
13:02:01 8 believe, is incorrect. There is a 14-day period for a
13:02:05 9 preliminary hearing. But the defendant doesn't have a
13:02:07 10 preliminary hearing if he is indicted first. So as a
13:02:10 11 practical matter, in cases in which an in-custody
13:02:15 12 defendant reserves the right to a preliminary hearing,
13:02:18 13 the government is likely to present the case to the
13:02:20 14 grand jury and secure an indictment within that 14-day
13:02:23 15 period. If the government secured an indictment on the
13:02:28 16 29th day, that would be consistent with the speedy trial
13:02:34 17 clock, although it would be a violation of the
13:02:36 18 preliminary hearing rule if there had been a preliminary
13:02:39 19 hearing requested. So I think they are two separate
13:02:43 20 rules with separate clocks.

13:02:45 21 Mr. LEMBKE: Correct. For example, I
13:02:47 22 suppose if it went according to all of the rules, we
13:02:50 23 would have a detention hearing, you know, within
13:02:53 24 whatever number of days, preliminary hearing within 14
13:02:56 25 days. If the Court found probable cause to hold the

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13:02:59 2 defendant, they would have 16 days from then to indict.

13:03:02 3 MAGISTRATE JUDGE PAYSON: I think that is
13:03:04 4 right.

13:03:04 5 Mr. LEMBKE: Follow me? I'm talking
13:03:06 6 about --

13:03:07 7 MR. HARVEY: I got you.

13:03:08 8 Mr. LEMBKE: And the time if we have
13:03:09 9 hearings it doesn't move the time back it starts from
13:03:13 10 back there when he was first arrested, the 30-day time
13:03:16 11 period.

13:03:17 12 MAGISTRATE JUDGE PAYSON: There has been a
13:03:18 13 speedy trial exclusion by virtue of the pendency of the
13:03:23 14 government's motion, so that may affect the speedy
13:03:26 15 indictment clock.

13:03:27 16 Mr. LEMBKE: All right. Okay.

13:03:29 17 MAGISTRATE JUDGE PAYSON: In any event, I
13:03:31 18 think the government has said it intends to present the
13:03:33 19 case to the grand jury, so we'll see.

13:03:37 20 Mr. LEMBKE: Okay.

13:03:38 21 MAGISTRATE JUDGE PAYSON: Thank you.

13:03:38 22 Mr. LEMBKE: Yes, thank you.

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24 CERTIFICATE OF REPORTER

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I certify that the foregoing is a correct transcript
of the record to the best of my ability of proceedings
transcribed from the audio in the above-entitled matter.

S/ Karen J. Clark, RPR

Official Court Reporter